# No. 12,529

IN THE

# United States Court of Appeals

For the Ninth Circuit

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UNITED STATES OF AMERICA,
*Appellant,*

vs.

FRANK WALLACE and R. M. MAKEMSON, doing business as WALLACE AND WALLACE, a Partnership,
*Appellees.*

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## Appellees' Brief

Upon Appeal from the District Court of the United States for the District of Arizona

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Upon Appeal from the District Court of the United States for the District of Arizona

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### SUGGESTED AMENDMENTS OF APPELLANT'S STATEMENT OF PLEADINGS AND FACTS

Appellant's statement of the case is misleading and inaccurate in several respects which will be commented upon hereinafter. Otherwise, it is substantially correct, and need not be restated.

(1) The quoted minute entry of the District Court, dismissing the case with prejudice on January 20, 1950

(Br. 5), omits the following paragraph of the original minute entry (T.R. 31):

> "Norman S. Hull, Esquire, objects to dismissal of case without prejudice and moves that case be dismissed with prejudice."

(2) In order to reflect the fact that on three previous occasions, during a period of time commencing with April 19, 1948, and ending with October 31, 1949, appellees and the District Court, with the knowledge of appellant, had entertained the thought of dismissal of the case for want of prosecution, certain omissions from recitals of the record should be supplied, as follows:

(a) In the recital that the case was called for trial setting on April 19, 1948 (Br. 3), it should appear that the case was called for trial setting, "or other disposition" (T.R. 4).

(b) The recital that when the case was again called for trial setting on February 14, 1949, appellant moved for the trial setting on May 10, 1949 (Br. 3), should reflect that the case was again called for setting "or other disposition", and that counsel for appellees "suggests dismissal" (T.R. 4), and that the action by the District Court which prompted such activity, was by minute entry of February 2, 1949 (T.R. 28) that:

> "It Is Ordered that the general calendar of civil cases in the Phoenix Division of this Court be called Monday, February 14, 1949, at 10:00 o'clock a.m., for trial setting or other disposition pursuant to Rule 14 of this Court."

(c) In the recital that the case was, on October 31, 1949, set for trial on January 20, 1950 (Br. 4), it should appear that the case was then "called for trial

setting or other disposition pursuant to Rule 14" of the District Court (T.R. 4, 30).

(d) In connection with the foregoing recitals, it should appear that Rule 14 of the District Court provides for calls of the calendar, and for trial settings upon such occasions or upon notice at other times, and that insofar as is here material, reads as follows (T.R. 29):

> "* * * Cases in which issue is joined shall be set for trial at the general call of the calendar, or dismissed for want of prosecution, except for good cause shown, the court may continue the same until the next call of the calendar. Cases which have been pending for more than 1 year without any proceedings having been taken therein during such year may be dismissed as of course, for want of prosecution by the court on its own motion at a general call of the calendar."

(3) Appellant's comments to the effect that an offer of compromise was made and rejected (Br. 4) should be disregarded. The record does not show anything other than that appellant's counsel made similar remarks to the District Court (T.R. 41, 42). There was no stipulation filed, nor minute entry made concerning such matter. Moreover, it appears to be well established law that unsuccessful settlement negotiations do not justify denial of a dismissal for want of prosecution. *People v. Superior Court* (1948), 86 Cal. A.2d 139, 194 P.2d 571; *Favretto v. Favretto* (1948), 86 Cal. A.2d 299, 194 P.8d 748; *Hale v. Uhl* (1928), 293 Pa. 454, 143 A. 115.

The record does not indicate whether the alleged offer of compromise was made at the suggestion of, or was encouraged by appellant, or

whether the alleged rejection was prompted by the amount of the alleged offer, or otherwise, but it does show that appellant's comments are irrelevant, because the alleged period of time involved (May 6 to September 7, 1949) was subsequent to the two occasions in April, 1948, and February, 1949, and prior to the third occasion on October 31, 1949, when the District Court called the case, on its own motion, for trial setting or other disposition (dismissal for want of prosecution).

## SUMMARY OF ARGUMENT

The issue here involves the exercise of discretion by the District Court, in denying appellant's motion to dismiss the action without prejudice and in granting appellees' motion to dismiss the action with prejudice.

In resolving that issue, this Court is not concerned with whether or not the District Court exercised such discretion wisely (as appellant assumes), but is whether or not the District Court exercised such discretion abusively.

The District Court dismissed the action for want of prosecution, upon the application of the defendants, under *Rule 41(b), Rules of Civil Procedure.* The purpose of *Rule 41(b)* is to prevent unnecessary harassment and delay in litigation. *Rule 41(b)* contemplates and calls for dismissal with prejudice in all cases (whether the order so directs or not), unless the District Court is convinced that the circumstances at hand warrant dismissal without prejudice.

The District Court was not convinced that the circumstances warranted dismissal without prejudice. It was justified, or at least it was not clearly wrong in such conclusion, because:

(1) The plaintiff was not seeking compensation, but was seeking to penalize defendants or to cause defendants to forfeit property in their possession and control, for which plaintiff had received full payment.

(2) The charge against defendants in the complaint was an odious one, which should have been prosecuted with dispatch.

(3) The case had been pending, and defendants' use and control of the property mentioned in the complaint had been curtailed by injunction, for a period of almost three years.

(4) Plaintiff had never, voluntarily and of its own motion, sought to have the case set for trial.

(5) The District Court, on its own motion, had called the case for trial setting or for dismissal for want of prosecution on three occasions.

(6) When the case finally came on regularly for trial, and when defendants announced ready for trial, plaintiff conceded that it was not prepared for trial, and that it could not state when, if ever, it would be so prepared.

(7) Plaintiff asked for dismissal, rather than for a continuance, and thereby invited dismissal with prejudice.

(8) On no occasion had defendants asked to have the case passed, postponed, continued or setting vacated.

(9) Defendants had been compelled to be available to appear, and did appear, and to prepare, and did prepare, to resist the application for temporary injunction, and to defend on the merits of the case, and to arrange for the several trial settings.

(10) Defendants had been put to great expense in appearing and preparing in the case, but could not recoup its costs from the Government.

## ARGUMENT

### I. The Cases Cited by Appellant Do Not Support Appellant's Theory

Appellant's theory is that the Rules of Civil Procedure merely codified and left unchanged the equity procedure followed in the federal courts prior to the adoption of the rules (Br. 9 to 12), and that under such procedure a plaintiff was entitled to a dismissal at any time (Br. 8), and that the District Court erred in holding otherwise, by refusing dismissal without prejudice and in ordering dismissal with prejudice (Br. 12 to 14).

In one case cited—*Peardon v. Chapman, et al.* (Br. 13)—however, it is expressly stated that:

> "* * * Rule 41(b) of the Civil Rules has directly reversed equity's traditional doctrine that a dismissal without consideration of the merits is also without prejudice to the complainant." (169 F.2d 913)

In two cases cited—*Home Owners' Loan Corporation v. Huffman,* and *International Shoe Co. v. Cool* (Br. 10, 12)—the Court of Appeals for the Eighth Circuit disagreed with, and repudiated, the theory of appellant in the instant case. Judgments were reversed for the failure or refusal of the district courts to order dismissal "with prejudice," and the court spoke, not only of the right of courts to condition dismissal for benefit of the defendant, but also of the fact that the rule has long prevailed:

> "* * * in both law and equity that a plaintiff may dismiss his case without prejudice only by the payment of the costs * * *." (134 F.2d 317).

The cases cited by appellant are not strictly in point, and can be classified and distinguished from the circum-

stances here prevailing, along the following lines (with some cases falling in more than one classification):

(1) Those which were decided prior to the Rules of Civil Procedure:

*Ex Parte Skinner & Eddy Corporation,* 1924 (Br. 8);
*Jones v. Securities & Exchange Commission,* 1936 (Br. 8, 9);
*Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co.,* 1902 (Br. 8);
*Union Tool Company v. Wilson,* 1922 (Br. 12);
*United Motors Service, Inc. v. Tropic-Aire, Inc.,* 1932 (Br. 8).

(2) Those in which the decision is merely that of a district court, exercising discretion under the circumstances there existing, and which present no question of review of such decision:

*Lawson v. Moore et al.* (Br. 10);
*Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co., ante* (Br. 8);
*Wilson v. Jolly* (Br. 10).

(3) Those in which the appellate court merely affirms the exercise of discretion by the trial court:

*Hydraulic Press Mfg. Co. v. Williams, White & Co.* —dismissed for want of equity—(Br. 10);
*Jones v. Securities & Exchange Commission, ante* (Br. 8, 9);
*United Motors Service, Inc. v. Tropic-Aire, Inc., ante* (Br. 8).

(4) Those in which dismissal (whether with or without prejudice) was conditioned upon the payment of defendant's costs and expenses:

*Bolten v. General Motors Corporation* (Br. 10, 11);
*Home Owners' Loan Corporation v. Huffman, ante* (Br. 10);
*International Shoe Co. v. Cool, ante* (Br. 12);
*Lawson v. Moore, ante* (Br. 10);
*Wilson v. Jolly, ante* (Br. 10).

(5) *Peardon v. Chapman, et al., ante* (Br. 13), in which dismissal with prejudice was reversed only because the plaintiff was not represented on the occasion of dismissal and the record disclosed that she had been misled by assurance from the court that her action "would not be dismissed with prejudice," whereas the court thereafter "without warning" did dismiss her action with prejudice. The appellate court said that, "With no warning of the Court's uncommunicated change of thought as to dismissal, she was not afforded an opportunity of protecting her cause of action" (169 F.2d 913).

(6) *Union Tool Co. v. Wilson, ante* (Br. 12), which involved discretion in the matter of awarding costs to a party sustaining damage through the violation of an injunction by the other party.

(7) *Field v. American-West African Line, Inc.* (Br. 12), wherein dismissal was suspended for a limited period of ten days to allow plaintiff, who was insane, to proceed to trial upon depositions which had already been taken. The following comment by the court is, however, apropos:

"* * * The delays have not all been the plaintiff's fault; but the situation has now come to a pass where *some final disposition must be made, for it is not fair indefinitely to expose the defendant to the possibility of liability* upon so remote a chance as the plaintiff's recovery." * * * (154 F.2d 652; emphasis supplied).

The opinion in *United Motors Service, Inc. v. Tropic-Aire, Inc., ante* (Br. 8), contains a clear statement of the principles which control this appeal:

"There may be gathered from the plethora of language employed in the cases in drawing fine distinctions a simple rule, viz., if it is inequitable to permit the dismissal of an equity case it should not be done. Whether it is inequitable is to be determined by the trial court in the exercise of a sound discretion. That discretion is reviewable only if there has been an abuse thereof. (57 F.2d 482).

"* * * * * * *

"There is danger of an appellate court substituting its judgment as to what should have been done in a situation such as here presented instead of realizing that the exercise of the discretion is for the trial court. * * *

*"If the court had refused to permit a dismissal without prejudice and had dismissed the case on the merits, we could not have said it abused its discretion.* The question for this court is not whether discretion was wisely exercised, but whether it was abusively exercised. We should be very clear in our conviction that the trial court abused its discretion in order to reverse its action. We do not have that abiding conviction." (57 F.2d 488; emphasis supplied).

## II. The District Court Did Not Abuse Its Discretion in Dismissing the Case with Prejudice

*Rule 41, Rules of Civil Procedure* governs this appeal. *Rule 41* contains two principal subdivisions: Subdivision (a)(1)(2) authorizes dismissal, under the circumstances mentioned therein, upon the application of the plaintiff or by order of court, and provides that such dismissal shall be without prejudice, unless otherwise specified; subdivision (b) authorizes dismissal for want of prosecution, upon the application of the defendant, and provides that such dismissal shall be with prejudice, unless otherwise stated (Br. 6, 7). Thus, whereas dismissal without prejudice is the rule, and dismissal with prejudice is the exception, when the plaintiff is allowed to dismiss or when the court dismisses of its own motion, the legal result is exactly opposite when dismissal is ordered for want of prosecution upon the application of the defendant. Under *Rule 41(b),* dismissal with prejudice is the rule, and dismissal without prejudice is the exception. *Carnegie Nat. Bank v. City of Wolf Point,* 9 Cir. (1940), 110 F.2d 569; *American Nat. Bank & Trust Co. v. United States,* Ct. App. D.C. (1944), 142 F.2d 571.

The record in this case shows that defendants moved for dismissal for failure of the plaintiff to prosecute, and that this motion was granted, and dismissal was ordered, all under *Rule 41(b):* The case came on regularly for trial on January 20, 1950; counsel for all parties were present, counsel for defendants *"announced ready for trial";* counsel for plaintiff announced "not ready for trial" because of the inability to locate plaintiff's principal witness; the court inquired of plaintiff's counsel as to when such witness

would be available, and plaintiff's counsel announced inability to make any showing on the matter; counsel for plaintiff then requested dismissal without prejudice; counsel for defendants resisted such request, and "moved the court to dismiss the action with prejudice for want of prosecution"; an order was entered on said date, dismissing the case with prejudice, and judgment of dismissal with prejudice was entered on January 24, 1950 (T.R. 31, 32, 38, 39, 41, 42).

The purpose of *Rule 41(b)* is to prevent unnecessary harassment and delay in litigation. *Barger v. Baltimore & O.R. Co.,* Ct. App. D.C. (1942), 130 F.2d 401. The Court of Appeals for the Second Circuit, in *Carlson Hoist & Machine Co., Inc. v. Valentine* (1938), 96 F.2d 147, 148, although speaking specifically of an equity rule of the District Court for the Eastern District of New York, expressed this purpose, as follows:

> "* * * Rule 4 was intended to deprive a plaintiff in equity of his ancient power to discontinue his suit at any time at his pleasure, vexing the defendant with repeated litigation; it put the decision within the trial court's discretion. When a plaintiff waits until the cause is called for trial, and until the defendant has fully prepared and attends with his witnesses, it is certainly no abuse of discretion for the judge to hold that 'justice requires' that the cause shall go to decree. To discontinue at such a time is some evidence of a disposition merely to harass the defendant."

This action was instituted on April 14, 1947 (T.R. 2, 15), and had been pending for almost three years before it was dismissed. During this time, appellees' power of control

and disposition over the property involved was drastically curtailed by an injunction (T.R. 1, 3, 16, 24, 25, 26). Plaintiff did not, during any of this time, move for a trial setting upon notice, although it could have done so under *Rule 14* of the Rules of Practice of the District Court (T.R. 1 to 7; 28, 29). The District Court, on its own motion pursuant to such *Rule 14,* called the case for trial setting or other disposition (meaning dismissal for want of prosecution), on three separate occasions—April 19, 1948, February 14, 1949, and October 31, 1949 (T.R. 28, 30). On one of such occasions—February 14, 1949—appellees pressed for dismissal (T.R. 4), but the District Court exercised its discretion in favor of appellant, and set the case for trial in lieu of dismissal, thereby giving appellants another chance to prosecute.

Under such circumstances, it is ridiculous for appellant to suggest that it had "every reason to confidently rely upon the court below to grant its motion to dismiss without prejudice", and that the denial of its motion came "utterly without warning" (Br. 13). A more appropriate suggestion would be that appellant had "every reason to believe that the court below would dismiss with prejudice", and that such dismissal came "after repeated warnings". Appellant invited such dismissal, when it moved for dismissal rather than for a continuance. Dismissal with prejudice for want of prosecution, although plaintiff moves for dismissal without prejudice, is not novel. *Cincinnati Traction Bldg. Co. v. Pullman-Standard Car Mfg. Co.,* D.C. (1938), 25 F. Supp. 322; *Walker v. Spencer,* 10 Cir. (1941), 123 F.2d 347.

The District Court was fully aware of the precise nature of the suit. It knew that plaintiff had received full payment

for the property described in the complaint and covered by its injunction, and that appellant sought to punish appellees for alleged participation in and alleged execution of, an alleged conspiracy to defraud the United States, by restoration of the property or by double payment of the purchase price (T.R. 10; Br. 5, 6). The charge was an odious one. It should have been prosecuted with dispatch, but it wasn't. When it ultimately came on for trial, with appellees ready for trial, it should have been, as it was, disposed of with finality.

Appellees were entitled to be relieved from further harassment through the threat of renewal of the charge against them. This alone warranted dismissal with prejudice. As stated in the opinion in *United States v. State of Tennessee,* D.C. (1947), 74 F. Supp. 637, 638 (concerning dismissal for want of prosecution of a suit to defraud the United States under another statute, which dismissal was not qualified by "without prejudice"):

> "* * * Here the defendants have been charged with conspiracy to defraud the United States by presentation of false claims. Such a charge, though it should prove to be groundless, hangs a cloud of infamy over the accused. The offense, if proved against a sovereign state, would be particularly abhorrent. So long as the charge is pending, it points a finger of opprobrium at the accused, and the situation remains fraught with possibility of immense harm, despite the principle that a defendant is presumed innocent until proved guilty. Such a grave charge as is here presented should be prosecuted with dispatch, or dismissed in the absence of impressive reason for delay."

Dismissal for failure to prosecute an action for damages from an alleged conspiracy under the Sherman Anti-Trust

pairment of their defense, because the law will presume injury from unreasonable delay.'" (138 F.2d 372).

This Court then commented upon the situation there which is parallel to the situation here, as follows (138 F.2d 373):

"The plain fact of the matter is that the appellant's case was not properly prepared; and, in the language of the trial court, 'it should have been prepared.' The appellant admitted lack of preparation when its counsel informed the court that 'certain other witnesses'—whose identity was not specified—could not be brought in, and asked for a voluntary nonsuit. It cannot complain, under all the circumstances of the case, if the court finally decided to dismiss the case with prejudice.

"We have carefully examined the record, keeping in mind these various contentions of the appellant. We find that the trial judge was guilty of no abuse of discretion—either 'gross' or slight."

## CONCLUSION

For the reasons and upon the grounds herein reviewed, which are set out specifically in the Summary of the Argument, and upon the authority of the reported decisions of this Court, it is respectfully submitted that the District Court, "was guilty of no abuse of discretion—either 'gross' or slight," and the judgment of the District Court must be affirmed.

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